Supreme Court, U. S.
FILED
DEC 3 1975
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1629

ANTHONY FERNANDEZ, PETITIONER

-versus-

UNITED STATES OF AMERICA, APPELLEE

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals

For The Ninth Circuit

ANTHONY FERNANDEZ
PRO SE COUNSEL FOR PETITIONER
29644 66th Ave. South
Auburn, Washington 98002

Index

	Page
Jurisdiction	1
Questions Presented	1
Ruling of Court below	2
Statement	2
Reasons for granting writ	3
Cases:	
Kotteakos v US, 328 US 760	2
Mattox v US, 146 US 917	2
Bollenbach v US, 326 US 612	3

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975
ANTHONY FERNANDEZ,
PETITIONER,
v
UNITED STATES OF AMERICA
APPELLEE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Comes now the petitioner humbly and in earnest, and requests that a writ of certioari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 4, 1975.

Jurisdiction

The judgment of the court below was entered on 9/4/75; the jurisdiction of this court is granted and invoked under 28 USC 1254; the lower court mandate issued on 9/25/75, making this petition timely for presenting the petition to this court.

Questions Presented

1/ Should a judge be required to explain further, or furnish parts of a transcript, to a jury seeking guidance and further information for reaching a verdict, in a trial lasting 30 days and mired with conflicting testimony and evidence?
2/ Should a former trial juror be allowed to give testimony or affidavit, not to impeach his verdict; but-show-that-he-was-confused as to evidence and testimony introduced at trial of petitioner and his belief that as such no fair trial has been held?
3/ Should a lie of government witness at time of trial, which lie was presented to jury for reaching a verdict be allowed to stand?

Argument

As to question 1: Judge East gravely erred in not further assisting the jury, when at trial said jury wrote a note to the judge requesting to view the transcript, the judge merely

replied the transcript was not available, he proceed no further to assist nor aid the jury–the judge was duty bound under defendant's rights of the Federal Constitution to call in the jury and clear away any prejudice resulting against the petitioner from lack of proper jury guidance and instruction. Kotteakos v US, 328 US 760.

As to question 2: The affidavit or testimony of former juror, Magnus, would have supported the improper jury instruction in that said jury was further instructing and requesting Judge East for guidance for their reaching a verdict, which was turned down in a cold "no" retort. Who can say what questions in addition to their requesting the transcript, that Judge East might have cleared away, in further proper instruction?? (Kotteakos v US)

This court ruled in Mattox v US, 146 US 917, that in fact jurors should be permitted to give affidavits, if it did not reach impeaching the verdict. Juror Magnus informed petitioner that even though he voted for guilty plea that he nevertheless felt a fair trial was not held, especially as to the aid and assistance sought from the judge as to further explanations and guidance!!

As to question 3: District Court Judge, Neill, who ruled and heard petitioner's petition, admits government witness Pete lied at the trial according to the affidavit said witness later gave to the petitioner. Possibly the jury would have questioned Judge East as to the testimony of this witness–proper guidance may have been the difference between guilt and innocent verdict–possibly the rereading of said witness's testimony, by the court reporter, might have contained some helpful information to correct the conflicting testimony. (Kotteakos v US)

Ruling of Court below

The court ruled that the district court did not abuse its discretion in denying the petitioner relief.

Statement

Petitioner is a native of the State of Washington (South-Western) and now resides in the Auburn area. He is a former Longview City Commissioner and conducted large lumber

operations prior to his confinement in Nov of 64. Indicted on 1 count of Conspiracy and 6 counts of interstate fraud, in April of 1962; tried on said counts on plea of not guilty on Nov & Dec of 1962 with finding of guilt by the jury, which was appealed to the 9th circuit in April of 1964, dismissing the conspiracy count and affirming the fraud counts, (329 F2d 899) petition for certiorari was denied in October of 1964, which resulted in confinement, which brought-parole-in-January-of 1970, from a sentence of 11 years and 11 months. Petitioner is now a PhD in the social fields–having earned this schooling and education in part while confined and the balance after parole.

Reasons for granting Writ

As this court rightfully states in Kotteakos v US, "this error must take account-what the error meant to them, not singled out and standing alone, but in relation to all else that happened." The error of Judge East in failing to correct misdirection of the jury was fatal to petitioner's constitutional right to a fair trail. Bollenbach v US, 326 US 612

This court has ruled in the past (Mattox case) that in fact a juror could give an affidavit so long as it did not impeach the verdict–no one here is attempting to impeach anything, but merely making a point as to un-constitutional violations and therefore an unfair trial!!

This petitioner has purposely submitted a very short and concise petition–but yet the issues of his unlawful conviction are in line with this high court's protection under the constitution as outlined by the petitioner in the rulings of said court under Mattox, Kotteakos and Bollenbach.

Petitioner's fraud conviction should be overturned and his petition for certiorari granted.

Dated this 10th day, of October, 1975.

Respectfully

Anthony Fernandez
Petitioner
29644 66th Ave South
Auburn, Washington 98002

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY FERNANDEZ,
Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 74-1861
MEMORANDUM

On Appeal from the United States District Court
for the Western District of Washington

Before: DUNIWAY and SNEED, Circuit Judges, and PLUMMER,* District Judge

Fernandez advanced two grounds in support of his petition for a writ of error coram nobis. The first was that a prosecution witness has given false testimony at Fernandez's trial, and the second was that the trial judge should have provided the jurors with a trial transcript, as they requested, during their deliberations.

Fernandez's first contention has already been presented to several courts. At a hearing held on Fernandez's third motion for a new trial, the witness, one Pete, recanted his affidavit that he had committed perjury. Fernandez took an appeal from the denial of that motion but later asked this court to dismiss the appeal, which we did. The affidavit was again presented in support of a fourth motion for a new trial, which was denied. We affirmed. Fernandez v. United States, 9 Cir., 1968, 401 F.2d 183. Fernandez is not entitled to another hearing on this contention. Sanders v. United States, 1963, 373 U.S. 1, 15-16.

*The Honorable Raymond E. Plummer, Senior United States District Judge for the District of Alaska, sitting by designation.

Fernandez adds nothing to his contention by including affidavits to the effect that two jurors stated that they would have reached different results if they had known that the testimony was perjured. Jurors may not impeach the mental processes by which they arrive at a verdict. United States v. Stacey, 9 Cir., 1973, 475 F.2d 1119, 1121.

Fernandez's argument that the trial court should have provided the jury with a trial transcript is also meritless. The trial judge has a large area of discretion in handling such requests and no abuse of that discretion has been shown. United States v. Baxter, 9 Cir., 1973, 492 F.2d 150, 175. United States v. DePalma, 9 Cir., 1969, 414 F.2d 394.

Fernandez's motion for a remand is denied. His request for a continuance and for oral argument is denied. The order appealed from is

AFFIRMED.

Service of one copy of petition for a writ of certiorari, was served on the Solicitor General, Room 5143, Dept of Justice, Washington, D.C. 20530, on October, 10th, 1975, by depositing the same, on said date, at U.S. Post Office, Auburn, Washington.

Anthony Fernandez

Subscribed and sworn to this 10th day of October, 1975.

Notary Public for State
of Washington

Supreme Court, U. S.
FILED
JUL 16 1976
MICHAEL RODAK, JR., CLERK

No. 75-1629

In the Supreme Court of the United States

OCTOBER TERM, 1976

ANTHONY FERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1629

ANTHONY FERNANDEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a prosecution witness testified falsely at his trial and that the court erred in refusing the jurors' request for a copy of the trial transcript.

After a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted in December 1962 of interstate fraud and conspiracy, in violation of 18 U.S.C. 2314 and 371. He was sentenced to imprisonment for 11 years and 11 months. The court of appeals affirmed the convictions on the substantive counts (329 F. 2d 889),[1] and this Court denied certiorari (379 U.S. 832).

---

[1]The court of appeals reversed petitioner's conspiracy conviction on the ground that the government had proved several conspiracies instead of the single conspiracy charged in the indictment.

Petitioner initiated the present proceeding for a writ of error *corum nobis* in 1974, contending that a prosecution witness testified falsely at his trial and that the court erred in refusing the jurors' request for a copy of the trial transcript. The district court denied the petition, and the court of appeals affirmed on September 4, 1975 (Pet. App.).

Even assuming the availability of a writ of error *corum nobis* to deal with matters such as those alleged by petitioner (but see *United States* v. *Morgan*, 346 U.S. 502, 512), he is not entitled to the relief that he seeks. Petitioner has challenged his conviction in four motions for a new trial and in a motion filed pursuant to 28 U.S.C. 2255, all of which have been denied. In connection with his third motion for a new trial, he submitted an affidavit from a prosecution witness in which the witness stated that he had testified falsely at trial (see Pet. App. 1).

At the hearing on the motion, however, the witness recanted the statements made in the affidavit and petitioner dismissed his appeal from the district court's denial of the motion. Petitioner again presented the affidavit in support of his fourth motion for a new trial. The motion was denied and the court of appeals affirmed (see Pet. App. 1). Petitioner has not here presented any new evidence warranting relitigation of this issue. See *Sanders* v. *United States*, 373 U.S. 1, 15-16.

With respect to petitioner's contention that the trial court erred in refusing the jury's request for a copy of the trial transcript, the court of appeals correctly concluded that "[t]he trial judge has a large area of discretion in handling such requests and no abuse of that discretion has been shown" (Pet. App. 2, citations omitted).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1976.